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BEFORE THE ARIZONA CORPORATION COMMISSION

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GARY PIERCE, Chairman  
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AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

DOCKET NO. S-20839A-12-0083

ANDREW C. MENICHINO, a married  
individual;

SECURITIES DIVISION'S MOTION  
TO ALLOW TELEPHONIC TESTIMONY

INNOVATIVE CONSTRUCTION, INC., a  
Pennsylvania Corporation,

Arizona Corporation Commission  
DOCKETED

ATLANTIC LEXUS, LTD., a Turks and  
Caicos Corporation;

DEC 06 2012

Respondents

DOCKETED BY

*SM*

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective witness Lawrence Tucker during the administrative hearing regarding the above-referenced matter.

Respondents have already stipulated to the Division utilizing the telephonic testimony of a Special Investigator for the Pennsylvania Department of Banking and Securities in this proceeding so this motion will address only the Division's request to allow the telephonic testimony of Lawrence Tucker, a Virginia resident.

This request is submitted on the grounds that, although Mr. Tucker can provide testimony that will provide key information at this administrative hearing, special circumstances prevent his actual appearance in Phoenix, Arizona during this proceeding. Mr. Tucker is expected to be called to provide relevant testimony regarding key documents utilized by the Respondents. For this primary reason, and for others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be granted.

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The Division anticipates calling Lawrence Tucker as a relevant witness to this hearing since he can offer probative testimony as to this case. In so doing, he can provide evidence supporting a number of the allegations brought by the Division. Lawrence Tucker is expected to testify briefly about the Respondents and regarding key documents utilized by the Respondents; however, the burdensome task of traveling from Virginia to Phoenix to provide testimony in person is impractical for this witness. Mr. Tucker resides in Virginia and is the Principal and Attorney of two entities, New Era Title, LLC and Tucker & Associates, PLLC, which requires his time and resources.

Mr. Tucker can offer highly probative evidence in this matter, yet faces one or more obstacles that prevent his personal appearance at the hearing, such as the time and cost to appear in Arizona for his short amount of testimony. It is anticipated that Mr. Tucker's testimony will require approximately one hour or less of the Division's time on direct; however, he would be required to travel about 2,300 miles and be away from his businesses. The simple and well-recognized solution to this problem is to allow for telephonic testimony. In fact, Respondents have already stipulated to the telephonic testimony of another out-of-state witness in this hearing. By allowing the telephonic testimony of Lawrence Tucker, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning - whether by direct or cross-examination.

**II. ARGUMENT****A. *The use of telephonic testimony in administrative hearings is supported by administrative rules and court decisions.***

In administrative cases like this one, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965). Procedural due process requires confrontation and cross-examination. The courts have

1 acknowledged that telephonic testimony in administrative proceedings is permissible and  
2 consistent with the requirements of procedural due process. *See e.g., T.W.M. Custom Framing v.*  
3 *Industrial Comm'n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (App. 2000).

4 The courts have also held that the Arizona Rules of Civil Procedure do not necessarily  
5 preclude telephonic testimony. *See In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d  
6 210, 213-14 (App. 2005); *Arizona Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d  
7 828, 831 (App. 1997) (citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an  
8 appearance by conference call meets the constitutional requirement of a meaningful opportunity  
9 to be heard)). In a civil case, "appearance by telephone is an appropriate alternative to personal  
10 appearance." *Valentine*, 190 Ariz. at 110, 945 P.2d at 831.

11 While the fact-finder's ability to observe the demeanor of the witness is limited, "the fact-  
12 finder can at least consider the pacing of the witness's responses and the tenor of his voice" to  
13 determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124,  
14 126-27 (App. 2001); *see also T.W.M. Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting  
15 "the telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses  
16 that may assist [the fact-finder] in making determinations of credibility").

17 The Arizona Corporation Commission promulgated Rules of Practice and Procedure that  
18 were intended to "be liberally construed to secure just and speedy determination of all matters  
19 presented to the Commission." *See A.A.C. R14-3-101(B)*. The rules encompass the use of other  
20 forms of testimony during administrative hearings: "In conducting any investigation, inquiry, or  
21 hearing, neither the Commission, nor any officer or employee thereof shall be bound by the  
22 technical rules of evidence, and no informality in any proceeding or in the manner of taking of  
23 testimony shall invalidate any order, decision, rule, or regulation made, approved, or confirmed  
24 by the Commission." *See A.A.C. R14-3-109(K)*.

25 Permitting the telephonic testimony of this witness at the administrative hearing will meet  
26 the constitutional requirement of providing Respondents with a meaningful opportunity to be

1 heard. Evidence bearing on the outcome of this hearing will not be barred, and Respondents will  
2 still have every opportunity to question the witness about his testimony and/or about any exhibits  
3 discussed.

4  
5 **B. *The Arizona Corporation Commission has a well-recognized history of permitting  
telephonic testimony during the course of administrative hearings.***

6 In light of the relaxed evidentiary and procedural rules governing administrative hearings  
7 in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
8 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
9 telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g.,*  
10 *In the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*  
11 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*  
12 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services*  
13 *Corporation et al.*, Docket No. S-03177A-98-0000.

14 Accordingly, granting leave to introduce the telephonic testimony of the Division's  
15 prospective witness is consistent with past determinations in administrative hearings before the  
16 Commission. In fact, Respondents have already stipulated to the telephonic testimony of another  
17 out-of-state witness in the hearing on this matter.

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1 **III. CONCLUSION**

2 By allowing the telephonic testimony of Mr. Tucker, not only will relevant evidence be  
3 preserved and introduced, but all parties will have a full opportunity for questioning - whether by  
4 direct or cross-examination. Telephonic testimony will also enable the Division to present relevant  
5 evidence that is expected to be reliable and probative, and does not compromise Respondents' due  
6 process rights. Therefore, the Division respectfully requests that its motion for leave to present  
7 such telephonic testimony be granted.

8  
9 RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of December, 2012.

10  
11 By   
12 Phong (Paul) Huynh  
13 Attorney for the Securities Division of the  
14 Arizona Corporation Commission

15 ORIGINAL and 8 copies of the foregoing  
16 filed this 6 day of December, 2012, with:

17 Docket Control  
18 Arizona Corporation Commission  
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21 COPY of the foregoing hand-delivered  
22 this 6 day of December 2012, to:

23 Administrative Law Judge Marc Stern  
24 Arizona Corporation Commission  
25 Hearing Division  
26 1200 West Washington  
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COPY of the foregoing mailed and e-mailed  
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